FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 71
P138/17

Lord President
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

SA and others

Petitioners and Reclaimers

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioners: Byrne; Drummond Miller LLP
Respondent: Webster; Office of the Solicitor to the Advocate General

16 November 2018

Introduction

[1] This is a reclaiming motion against an interlocutor of the Lord Ordinary, dated 6 September 2017 (2017 SLT 1245), to refuse the prayer of a petition for judicial review of a decision of the Upper Tribunal, dated 11 November 2016. The UT had refused to grant permission to appeal from a decision of the First-tier Tribunal, dated 24 May 2016. The FTT had in turn refused an appeal from the respondent's decision of 1 June 2015 refusing the petitioners' applications for leave to remain in the United Kingdom. There are two issues.

The first is whether the Lord Ordinary erred in his approach to the substantial merits of the case; specifically in relation to his interpretation of paragraph 276ADE(1) of the Immigration Rules and section 117B of the Nationality, Immigration and Asylum Act 2002. The court decided to await the outcome of the appeal from *IT (Jamaica)* v *Secretary of State for the Home Department* [2017] 1 WLR 240, which had been heard before the United Kingdom Supreme Court on 17 and 18 April 2018 and which had the potential to resolve this issue; being similar to that in *MA (Pakistan)* v *Upper Tribunal* [2016] 1 WLR 5093 (*infra*). The UK Supreme Court issued its judgment on 24 October 2018 (*KO (Nigeria)* v *Secretary of State for the Home Department* [2018] UKSC 53) refusing the appeal in *IT (Jamaica*). The second issue is procedural, and is raised in a cross-appeal by the respondent. It is whether the Lord Ordinary erred in concluding that the second appeals test, as set out in *Eba* v *Advocate General for Scotland* 2012 SC (UKSC) 1, only applies at the stage of granting permission to proceed, under section 27B(3) of the Court of Session Act 1988.

Legislation and Rules

[2] The Immigration Rules provide:

> "276ADE(1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of the application, the applicant
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> > (i) does not fall for refusal under any of the grounds [relating to deportation, conviction of offences, or presence not conducive to the public good]; and
> >
> > ...
> >
> > (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years ... and it would not be reasonable to expect the applicant to leave the UK; or
> >
> > ...
> >
> > (vi) ... is aged 18 or above, has lived continuously in the UK for less than 20 years ... but there would be very significant obstacles to the applicant's

integration into the country to which he would have to go if required to leave the UK."

[3] Part 5A of the Nationality, Immigration and Asylum Act 2002 applies where a court or tribunal requires to determine whether a decision breaches a person's right to respect for his or her private or family life under Article 8 of the European Convention on Human Rights and Fundamental Freedoms. It provides (s 117A(2)) that, in considering "the public interest question", the court or tribunal must have regard, in all cases, to certain considerations, *viz*:

"117B ...

(1) The maintenance of effective immigration controls is in the public interest.

...

(4) Little weight should be given to–

(a) a private life;

...

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where–

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

Immigration history

Respondent's decision

[4] There are four petitioners. The first and second petitioners are nationals of Bangladesh. They are the parents of the third and fourth petitioners. Thirteen years ago, the

first and second petitioners entered the UK unlawfully. They made applications for asylum, which were refused on 25 February 2009. These decisions were upheld on appeal by an Immigration Judge on 6 April 2009. The third and fourth petitioners were born in the UK, on 30 January 2008 and 16 March 2015 respectively.

[5] The third petitioner is now ten years old. She has lived her whole life in the United Kingdom. She attends primary school in Edinburgh, having been at nursery before that. Her school reports record that her numeracy and literacy skills are of a high standard. They paint a picture of a child who is flourishing both socially and academically. She speaks fluent English. She is able to speak some Bengali, as she hears it at home, particularly from her father, who is not fluent in English. Her mother does speak English fluently. The third petitioner speaks "a little" Urdu, which she also hears at home, which the petitioners share with another family. She is not fluent in either language, and prefers to speak in English. She converses in English with her aunts, uncles and cousins. She never speaks Bengali outside the home. She cannot read, write or calculate in either Bengali or Urdu. She has never left the UK, and has never visited Dhaka, or any other part of Bangladesh.

[6] In 2015, the petitioners applied to the respondent for leave to remain. Their application was refused on 1 June 2015, on the basis that they did not satisfy rule 276ADE of the Immigration Rules (*supra*) which requires, for adults who have lived for less than 20 years in the UK, that there be "very significant obstacles to the applicant's integration" into the receiving country. The application was then considered outside of the rules, in terms of the right to respect for private and family life under Article 8. The application was first considered in respect of each petitioner individually and then as a family unit. It was refused on the basis that the interference with the petitioners' Article 8 rights, individually

or collectively, was not disproportionate. In particular, in relation to the third petitioner, it was not:

> "considered to be unreasonable to expect [her] to leave the UK because [she is] of an age whereby [she] will be able to adapt to new surroundings. [Her] parents will be able to assist with [her] integration into Bangladesh and [she] will be able to continue [her] education there".

The First Tier Tribunal

[7] The petitioners appealed to the First-Tier Tribunal. A report from a child psychologist, Dr Jack Boyle, dated 30 March 2016, was produced. This considered the educational impact on the third petitioner of her removal to Bangladesh, with the consequent disruption on her family life and education. The report concluded that, as the third petitioner had only ever experienced Scottish culture and was fluent only in English, the differences between the two countries would present a major challenge. Psychologically, she would initially perceive her removal as a "form of exile", based on her forced integration into an unfamiliar culture and her introduction into an education system in which she would initially be illiterate and unable to communicate fluently. Her educational prospects in Bangladesh would be "bleak" in comparison to those in Scotland.

[8] On 24 May 2016, the FTT refused the petitioners' appeal. The FTT recorded, presumably having regard to the Notices to Appeal (not produced in this process), that it was accepted that the petitioners did not meet the requirement of the Immigration Rules ("very substantial obstacles ... to ... integration into" Bangladesh). In considering the Article 8 ground, the FTT set out a five stage test, including proportionality. The first and second petitioners' immigration history and status were factors to be taken into account. Whilst the welfare of the children was a primary consideration, both the third and fourth petitioners had been born in the UK at a time when their parents' immigration status was

precarious. The starting point was that it was in the best interests of children to be with their parents (*Azimi-Moayed and others (decisions affecting children; onward appeals)* [2013] Imm AR 696). If their parents were to be removed, so should the children.

[9] The third and fourth petitioners should not be blamed for the actions of their parents. The third petitioner was making good progress at school and was settled in the UK. Education in Bangladesh was at a lower standard. However, she was able to speak some Bengali and Urdu and this, taken together with support from her parents, would assist her on "return" to Bangladesh. Over time, the petitioners would be able to adapt to a new environment. The first and second petitioners had spent most of their lives in Bangladesh. "It is not unreasonable to expect them to return to their country of origin". *PD (Article 8-conjoined family claims) Sri Lanka* [2016] Imm AR 797 could be distinguished on the ground that the third petitioner was only 8 (as distinct from 14) years old and was not at a critical stage of her development.

[10] Having taken into account the requirements of section 117A and 117B of the Nationality, Immigration and Asylum Act 2002, the fact that the first and second petitioners' private lives in the UK had been established at a time when their immigration status was uncertain, and on the "most likely future scenario", it was reasonable "to expect [the petitioners] to leave the United Kingdom and return to Bangladesh".

The Upper Tribunal

[11] The petitioners applied for permission to appeal on the basis that the FTT had erred in failing to follow *PD (Article 8 – conjoined family claims) Sri Lanka* (*supra*). The FTT had not made any findings on the best interests of the children and, in particular, whether it would be reasonable for them to leave the UK. The FTT had failed to take into account the terms of

Dr Boyle's report. The application for permission was refused by the FTT on 3 October 2016, on the basis that the decision did not disclose any arguable error of law. The FTT had given reasons for concluding that there was no breach of Article 8, outwith the Immigration Rules, which, it was accepted, had not been met. The decision had "manifestly" dealt with the children's interests, hence the citation of the relevant authorities.

[12] The petitioners sought permission from the Upper Tribunal, on the same grounds. On 11 November 2016, the UT refused permission to appeal. This is the decision complained of in these proceedings. The basis for refusal was that the first and second petitioners were failed asylum seekers and none of the petitioners had ever had leave to be in the UK. In terms of *PD (Article 8 – conjoined family claims) Sri Lanka* (*supra*), the correct approach was first to consider the claims individually in terms of the Rules and then look at the claims as a whole outwith the Rules. It was accepted that none of the petitioners could meet the terms of the Rules. The issue was then whether the decision was disproportionate, when applying Article 8 outwith the Rules. The FTT had had regard to the best interests of the children as a primary consideration. Whilst the FTT had not expressly referred to Dr Boyle's report, it had considered its content. The unlawfulness of the petitioners' status fell to be taken into account when considering the public interest and the petitioners' Article 8 claims (2002 Act, s 117B; *EV (Philippines)* v *Secretary of State for the Home Department* [2014] EWCA Civ 874; *MA (Pakistan) and Ors* v *Upper Tribunal* [2016] 1 WLR 5093) . It was not arguable that the FTT had erred in the approach to the children's best interests or to Article 8 as a whole.

The Judicial Review

[13] The petitioners' judicial review of the UT's refusal to grant permission proceeded on

the basis that the UT had erroneously construed section 117B of the 2002 Act, and Immigration Rule 276(ADE)(iv). In particular, section 117B directed the decision-maker to focus solely on whether it was reasonable for the child to be removed and not on all the circumstances which might engage the public interest, such as the parents' immigration history and general conduct. On 12 April 2017, the Lord Ordinary granted permission for the petition to proceed, under section 27B of the Court of Session Act 1998, on the basis that the petition had "a real prospect of success".

[14] The Lord Ordinary considered that the first issue to be determined was whether the UT had erred in its approach to section 117B(6) of the 2002 Act. The question was whether it was unreasonable to expect the child to leave the UK, based solely on the position of the child or whether the immigration history of the parents ought to be taken into account. It was argued that *MA (Pakistan)* v *Upper Tribunal* (*supra*), which had taken into account *MM (Uganda)* v *Secretary of State for the Home Department* [2016] Imm AR 954, had been wrongly decided. The reasoning, but not the conclusion, of the Court of Appeal in *MA (Pakistan)* ought to be adopted.

[15] The Lord Ordinary was not persuaded that the decision of the Court of Appeal in *MA (Pakistan)* was wrong. The approach in *MM (Uganda)* had been affirmed in *IT (Jamaica)* v *Secretary of State for the Home Department* [2017] 1 WLR 240 (at para 51). The fact that a child required to leave the UK because her parents had no right to remain provided an important context. The parents' immigration history was a part of the family situation, and the child's position could not be considered separately. If Parliament had intended section 117B(6) to be a stand-alone assessment of whether it was reasonable for a child to leave the UK, it could have said so. Paragraph 276ADE(1)(iv) of the Immigration Rules required the court to consider why the child was required to leave the UK in the first place.

Unless a child was estranged, his private life was inevitably bound up with the rest of the family.

[16] Secondly, the Lord Ordinary held that the UT had been entitled to conclude that the FTT had taken into account Dr Boyle's report in holding that the third petitioner had not reached the critical stage of her personal and educational development, such that it would be unreasonable for her to leave the UK. The reasons for the decision of the FTT were clear, and there was no requirement for them to make specific reference to Dr Boyle's report.

[17] The third issue was whether the court should revisit the second appeals test at the substantive hearing; that is to say whether the court should consider of new whether the application raised an important point of practice or principle, or there was some other compelling reason to allow it (*Eba* v *Advocate General (supra*)). The Lord Ordinary determined that it was not open for the court to do so. The second appeals test was applied at the permission stage (*R (Essa)* v *Upper Tribunal* [2012] EWHC 1533 (QB); *R (HS)* v *Upper Tribunal* [2012] EWHC 3126 (Admin); *R (Nicholas)* v *Upper Tribunal* [2013] EWCA Civ 799; and *R (Cart)* v *Upper Tribunal* [2012] 1 AC 663). The court's role was a gatekeeping or sifting one. It was important to be able to identify from the averments the point which was advanced (*SA* v *Secretary of State for the Home Department* 2014 SC 1, LJC (Carloway) at para 43). Once the petition had passed the permission stage, the normal rules of judicial review would operate. Operating the second appeals test twice would increase uncertainty and add unnecessary delay and expense, which was undesirable in itself.

Submissions

Petitioners

[18] The petitioners submitted that the Lord Ordinary had erred in following the Court of Appeal in *MA (Pakistan)* v *Upper Tribunal* (*supra*) on the interpretation of section 117B(6) of the 2002 Act. He had taken the expansive approach in *MA (Pakistan)*, when he ought to have taken a narrow approach; consistent with the ordinary meaning of the language of the provisions, their context, the legislative background and the statutory purpose. The narrow approach was that, whether it was reasonable to expect a child to leave the UK ought to be determined according to the child's interests alone. Section 117B(6) of the 2002 Act conveyed a benefit to parents whose children could not reasonably be expected to leave the UK. Rule 276ADE(1)(iv) benefitted only the child. In both cases, the language was "child-centric". If it was read in the expansive manner, it would pose a general (and different) question of whether it was reasonable for the family to leave. The minister, who had promoted the Bill which had introduced section 117B(6), had explained (*Hansard*, 5 March 2014, n 11, col 1383) that its purpose was to enable consideration to be given solely to the interests of the child.

[19] *MM (Uganda)* v *Secretary of State for the Home Department* (*supra*) was distinguishable, as it was concerned with section 117C (parents subject to deportation), when a child would not be removed if it was "unduly harsh" to do so (cf *Zoumbas* v *Secretary of State for the Home Department* 2014 SC (UKSC) 75; and *R (MM and others)* v *Secretary of State for the Home Department* [2016] 1 WLR 2858). There was no need to introduce considerations concerning the parents' conduct in section 117B, just because section 117C did so. For many years there had been a recognition that children, who had spent seven years in the UK, should not be removed, other than in exceptional circumstances (*NF (Ghana)* [2008] EWCA Civ 906 at

para 37; *Uner* v *Netherlands* (2007) 45 EHRR 14 at para 58). The concession in that regard had been formally withdrawn in 2008, but the period was still regarded as properly reflecting Article 8 requirements (*Azimi-Moayed and others (decisions affecting children – onward appeals)* (*supra*); *Treebhawan and others (section 117B(6))* [2015] UKUT 00674 (IAC); *PD (Article 8 – conjoined family claims) Sri Lanka* (*supra*)).

[20] The FTT had failed to give the child's length of residence and the content of Dr Boyle's report any significance.

[21] On the cross appeal, the Lord Ordinary's reasoning was correct. The application of the second appeals test ought to be the same for both appeals and judicial reviews. The Tribunals, Courts and Enforcement Act 2007 (s 13(6A)) enabled the Lord President to promulgate rules to introduce the test. This had been done (RCS 41.57). The test required to be applied quickly at a preliminary stage (*SA* v *Secretary of State for the Home Department* (*supra*) at para [43]). *MA (Pakistan)* (*supra*) had been decided after the FTT decision but before that of the UT when refusing leave. The case therefore fell into the category of one where leave ought to be given, even if the prospects of success had not been high (*Uphill* v *BRB (Residuary)* [2005] 1 WLR 2070 at para 24(3).

Respondent

[22] The respondent submitted that the argument, that the FTT had incorrectly assessed the reasonableness of the third petitioner leaving the UK by considering the whole circumstances, had not been argued before the UT. The argument had been that there had been no analysis of whether it was reasonable for the children to leave the UK. The Lord Ordinary had been correct in following *R (MA (Pakistan))* v *Upper Tribunal* (*supra,* at para 45, citing *MM (Uganda)* v *Secretary of State for the Home Department* (*supra*)). Otherwise, the

words "not be reasonable to expect" in section 117B(6) and Rule 276ADE(1)(iv) would be wrongly dislocated: (a) from their statutory and broader context, and would sit disconsonantly with section 117C; and (b) from the circumstances in which the issue arose. Proportionality required a consideration of the whole family circumstances (*PD (Article 8 – conjoined family claims) Sri Lanka* (*supra*) at para 21). Section 117B(6) and Rule 276ADE(1)(iv) were concerned with the weight to be afforded to the public interest in the assessment of proportionality. The construction of section 117C had been followed in *IT (Jamaica)* v *Secretary of State for the Home Department* (*supra*, at para 51).

[23] The substance of Dr Boyle's report had been considered by the FTT, as the Lord Ordinary had concluded.

[24] The Lord Ordinary had erred in law in rejecting the proposition that the second appeals test continued to apply after the grant of permission to proceed. Section 27B(3)(c) of the Court of Session Act 1988 posed only a threshold question; of whether the application "would raise" an important point not that there was such a point. The test was a low one (*MIAB* v *Secretary of State for the Home Department* 2016 SC 871 at para [66]). It was only to allow applications to proceed. Granting an application for review of an unappealable UT decision required, at common law, it to fall within the scope of the court's supervisory jurisdiction (*Eba* v *Advocate General* (*supra*) at paras [47]-[49]; *SA* v *Secretary of State for the Home Department* (*supra*) at para [35]). This distinction could be seen when considering amendments of disputed fact where the averments, which raised an important point, were never proved. Were it otherwise, the assessment at the substantive hearing would involve a lesser test than that at the permission stage. The UK Supreme Court had developed the test on the basis of the development of the common law as defining the scope of the remedy and not as a restriction on jurisdiction. This approach enhanced the relative autonomy of

tribunals by allowing access to the supervisory jurisdiction, by using the permission stage whilst maintaining the ability of the court to exercise the restraint recognised in *Eba* v *Advocate General* (*supra*) and *R (Cart)* v *Upper Tribunal* (*supra*) (cf *R (HS and others)* v *Upper Tribunal* [2012] EWHC 3126 (Admin) at para 37).

[25] The petition did not raise an important point of principle or practice and there was no other reason to employ the supervisory jurisdiction. Identification of an error of law was not enough; the point must call out for consideration (*SA* v *Secretary of State for the Home Department* (*supra*) at para [43]). The proper construction of the section and the rule had already been considered by the superior courts in *R (MA (Pakistan))* (*supra*) which rejected the petitioners' contentions. The grounds now advanced had not been raised before the FTT or the UT; no error of law could therefore be identified (*SB* v *Secretary of State for the Home Department* [2013] CSIH 89 at para [23]). Justice did not require the introduction of a new ground of challenge which was not before the FTT or UT (*Advocate General* v *Murray Group Holdings* 2016 SC 201 at para [39]; *Uphill* v *BRB Residuary* (*supra*) at para 24(2)). The application of existing principles to the facts of a particular case did not involve an important point of itself. There had been no "wholly exceptional collapse of fair procedure" (*R (Cart)* v *Upper Tribunal (supra)* at para 108).

Decision

Second Appeals Test

[26] Prior to *Eba* v *Advocate General* 2012 SC (UKSC) 1, the court could refuse to allow a petition for judicial review to proceed only in exceptional circumstances such as manifest incompetency or where the averments were incomprehensible or gibberish (see *SA* v *Secretary of State for the Home Department* 2014 SC 1, LJC (Carloway) delivering the Opinion

of the Court, at para [30]). Arguability was not the test, as it was in England and Wales (*ibid*). In *Eba*, Lord Hope said that, for pragmatic reasons concerning pressure of business, this should be reconsidered for the category of petitions which challenged an unappealable refusal of leave to appeal to an Upper Tribunal (*ibid* para [31]). Lord Hope encouraged the use of a new test whereby review would be restricted to cases in which the alleged error involved an important point of principle or practice, or there was some other compelling reason for allowing an appeal to the UT. This would encompass a decision of the FTT being plainly wrong or the hearing not being fair because of a procedural irregularity (*ibid* para [35] citing *Eba* at para 48). At the time of *Eba*, the only point at which this new "second appeals test" could be applied was at the substantive hearing, although the test was introduced, as it had been in England and Wales, in respect of applications for leave to appeal from the UT to the court following upon the Crimes and Courts Act 2013 (s 23, adding s 13(6A) to the Tribunals, Courts and Enforcement Act 2007; RCS 41.57).

[27] In *SA* v *Secretary of State for the Home Department* (*supra*) changes to the Court of Session Act 1988 were anticipated, whereby leave would be required before a petition for judicial review could proceed. The test would be whether the application had a real prospect of success. It was said (LJC (Carloway) at para [33]) that:

> "Presumably, consideration of whether there are prospects of success in a petition for review of an unappealable refusal of leave by an Upper Tribunal will involve the court determining whether the test in *Eba* is capable of being met. At all events, it would seem that, in the not too distant future, there will be scope for deciding that question as a preliminary issue at the outset of the proceedings."

The Courts Reform (Scotland) Act 2014 introduced the anticipated changes by adding sections 27A to D of the Court of Session Act 1988. Henceforth, a judicial review would require permission to proceed (s 27B(1)) and that would be granted only if the application had a "real prospect of success". However, in relation to Upper Tribunal decisions on

appeal from a First-Tier Tribunal it is specifically provided that permission under section 27B(1) can only be granted if:

> "(3)... (b) the application has a real prospect of success; and
>
> (c) either –
>
> (i) the application would raise an important point of principle or practice; or
>
> (ii) there is some other compelling reason for allowing the application to proceed".

[28] The decision on whether the second appeals (or *Eba*) test has been met is therefore to be taken at the stage of determining whether permission should be granted (RCS 58.7). Thereafter, if permission is granted, the petition proceeds to a procedural, and thereafter a substantive, hearing. There is no room for two decisions (perhaps by two different Lords Ordinary) on the same point to be made in a first instance process. The use of the word "would" in section 27B(3)(c)(i) means no more than that an important point will arise in the determination of the case at the substantive hearing. In short, Parliament has determined that the second appeals test is to be decided as a preliminary matter. Once so decided, it cannot be re-raised at a later stage. The substantive hearing will thereafter determine the merits without regard to the second appeals test, which will have already been met.

[29] It follows, however, that the interlocutor of 12 April 2017 contains an error. It purports to apply only the general test of real prospect of success. It ought, if it were intended to provide a reason for granting permission, to have stated, in addition, whether the grant was because of the raising of an important point and/or because of some other compelling reason.

Merits

[30] In *KO (Nigeria)* v *Secretary of State for the Home Department* [2018] UKSC 53, the UK Supreme Court expressly approved of the Lord Ordinary's reasoning on the central issue in this reclaiming motion. Lord Carnwath (with whom the other justices agreed) said:

> "18. ... [I]t seems ... inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in *SA (Bangladesh)* v *Secretary of State for the Home Department* 2017 SLT 1245:
>
> > '22. ... [B]efore one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, "Why would the child be expected to leave the United Kingdom?" In a case such as this there can only be one answer: "because the parents have no right to remain in the UK". To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …'
>
> 19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children ... in *EV (Philippines)* v *Secretary of State for the Home Department* [2014] EWCA Civ 874, para 58:
>
> > '58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. ... If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?'
>
> To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that 'reasonableness' is to be considered otherwise than in the real world in which the children find themselves."

In one of the appeals (*NS*) Lord Carnwath (at para 48) referred to UT Judge Perkins' analysis of a situation in which the parents had used false documents to extend their stay in the UK. He had explained that the difficulty was, as it is in this case, the children. In refusing the appeal, the Judge had taken account of the factors in both sections 117B(6) (reasonable to expect the child to leave) and 117B(5) (little weight to time in a precarious immigration

state). Again, as in this case, the children would "lose much". It was in their best interests to remain with their parents in the UK, where they are settled. None of the children had had any life outside the UK and they were happy, settled and doing well. Nevertheless, the Judge had continued:

> "... The fact is their parents have no right to remain unless removal would contravene their human rights.
>
> I remind myself of my findings concerning the need to maintain immigration control by removing the first, second and third appellants. Given their behaviour I would consider it outrageous for them to be permitted to remain in the United Kingdom. They must go and in all the circumstances I find that the other appellants must go with them."

Other than commenting on the use of the word "outrageous", Lord Carnwath considered that Judge Perkins had correctly directed himself as to the wording of the subsection. He continued:

> "... The parents' conduct was relevant in that it meant that they had to leave the country. As I have explained (para 18 above), it was in that context that it had to be considered whether it was reasonable for the children to leave with them. Their best interests would have been for the whole family to remain here. But in a context where the parents had to leave, the natural expectation would be that the children would go with them, and there was nothing in the evidence reviewed by the judge to suggest that that would be other than reasonable."

It follows that the Lord Ordinary's reasoning cannot be faulted and the appeal on this ground must be refused.

[31] There is little substance in the remaining grounds. Although the expression of certain matters might, as in many decisions, have been better, it is clear, when reading the decision of the First-tier Tribunal as a whole, that it took in all the relevant considerations, including the length of the child's residence. Although Dr Boyle's report was not specifically referred to, its content was alluded to. The short point is that, although not specifically stated, it was clear that it would have been in the best interests of the third

petitioner to have remained in the UK with the first and second petitioners. Nevertheless, when the other factors in section 117B were taken into account, the FTT was entitled to refuse the appeal for the reasons which it gave.

[32] The reclaiming motion must accordingly be refused.